NOT JUST A MATTER OF CHROMOSOMES: A COMPARISON OF PROTECTIONS FOR TRANSGENDER INDIVIDUALS UNDER TITLE VII AND THE FEHA

By

Tzu Chuan Teng*

One of the most exciting developments in the area of employment law is the increasing protection for transgender individuals from workplace discrimination. Both federal and state laws have made advancements in recognizing the difference between sex and gender. They acknowledge that protection against sex discrimination alone does not adequately address the problem of widespread discrimination against transgender people.[1] Title VII of the Civil Rights Act of 1964 (Title VII)[2] and the Gender Non-Discrimination Act of 2003,[3] which amended California's Fair Employment and Housing Act (the FEHA)[4] to specifically include transgender individuals are among the sources of this increasing protection.[5] This essay examines the differences between these acts by focusing on two primary points of distinction: 1) how each expands its protection to include transsexual individuals; and 2) the specific grooming code protection offered by the FEHA..

I. HOW THE FEHA AND TITLE VII EXPANDED PROTECTION TO INCLUDE TRANSSEXUAL INDIVIDUALS

Although transgender individuals are finding increasing solace from provisions barring employment discrimination under both Title VII and the FEHA, those protections arise in dramatically different ways. Transgender individuals are explicitly included within the purview of the FEHA.[6] Amended by the 2003 Gender Non-Discrimination Act, the FEHA now specifically includes "gender" in its definition of "sex" and makes it unlawful for an employer to discriminate against an individual on the basis of gender.[7] CAL. GOV'T CODE § 12926(p) provides:

> (p) "Sex" includes, but is not limited to, pregnancy, childbirth, or medical conditions related to pregnancy or childbirth. *"Sex" also includes, but is not limited to, a person's gender, as defined in Section 422.56 of the Penal Code.* (Italics added to show amended language.)[8]

CAL PEN. CODE § 422.56(c) defines "gender" as:

> "Gender" means sex, and includes a person's gender identity and gender related appearance and behavior whether or not stereotypically associated with the person's assigned sex at birth.[9]

This language explicitly recognizes gender discrimination as a distinct form of sex discrimination. The 2003 Amendments reflect the California Legislature's intent to specifically expand the prohibition on sexual discrimination by including gender in the definition of sex.[10] Therefore, under the FEHA, a transsexual individual who brings a gender discrimination claim is recognized as a member of a protected class under the law.[11]

Title VII, however, remains largely in its original form and does not recognize gender discrimination in its statutory language.[12] It provides, in relevant part, that "it shall be an unlawful employment practice for an employer …to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual's race, color, religion, sex, or national origin."[13] Title VII has begun expanding its protections to include transgender individuals.[14] Unlike the legislative initiatives that broadened the FEHA,[15] the expansion under Title VII is the result of courts' evolving interpretations of the act to address societal needs.[16]

Until the past decade, courts held that transgender individuals had no recourse against employment discrimination under Title VII.[17] In *Ulane v. Eastern Airlines,* the employed discharged a transsexual employee, who ceased being male and became female.[18] While recognizing distinctions among homosexuals, transvestites, and transsexuals, the Court held that Title VII protections do not apply to transsexuals because "sex" must be narrowly construed to mean only anatomical and biological characteristics, and because Congress never intended Title VII to protect transsexuals.[19]

For years, courts adhered to the holding in *Ulane*, and denied Title VII protection to transgender individuals.[20]

It was not until the U.S. Supreme Court issued its decision in *Price Waterhouse v. Hopkins*[21] that transsexuals began to gain protection under Title VII.[22] In *Price Waterhouse*, a female candidate was refused admission to partnership in her accounting firm because she was deemed too masculine.[23] She was told that her professional problems would be solved if she were to take "a course at charm school," "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry."[24] Writing for a plurality of the Court, Justice Brennan introduced the notion of "sex-stereotyping" as the basis for framing a sex discrimination claim under Title VII.[25] He reasoned that differential treatment of men and women resulting on account of non-adherence to sex-stereotypes may be considered sex discrimination for purposes of Title VII protection.[26] Since the Supreme Court's decision in *Price Waterhouse*, subsequent lower court decisions have expanded the Court's interpretation to include protection for transsexuals.[27]

The most notable case is *Smith v. The City of Salem*, where the Sixth Circuit Court explicitly held that Title VII protection covers transgender individuals.[28] The plaintiff in *Smith* was born male, but identified himself as female.[29] When the plaintiff began to express a more feminine appearance at work, co-workers commented that his appearance and mannerisms were not "masculine enough" and initiated a plan to terminate him.[30] In response to defendants' plan to terminate him on account of his transsexualism, the plaintiff obtained legal representation and was ultimately suspended.[31]

Contrary to the lower court's holding, the Sixth Circuit maintained that the plaintiff in *Smith* stated a claim for relief pursuant to *Price Waterhouse*'s prohibition of sex stereotyping.[32] It noted: "After *Price Waterhouse*, an employer who discriminates against women because, for instance, they do not wear dresses or makeup, is engaging in sex discrimination because the discrimination would not occur but for the victim's sex. It follows that employers who discriminate against men because they

do wear dresses and makeup, or otherwise act femininely, are also engaging in sex discrimination, because the discrimination would not occur but for the victim's sex.."[33] Analogizing the plaintiff's claim to that in *Price Waterhouse*, the Court held:

> Discrimination against a plaintiff who is transsexual—and therefore fails to act and/or identify with his or her gender—is no different from the discrimination directed against Ann Hopkins in *Price Watherhouse*, who, in sex-stereotypical terms, did not act like a woman.[34]

In so doing, the Court firmly expanded Title VII's protection against sex discrimination to transsexuals through a blanket prohibition against discrimination motivated by sex-stereotyping.[35]

Other courts have similarly held that transsexuals are covered under Title VII's protection against sex discrimination.[36] In *Schwenk v. Hartford*, the Ninth Circuit interpreted the Supreme Court's reasoning in *Price Waterhouse* to suggest that the terms "sex" and "gender" are interchangeable.[37] The Court further noted that for the purposes of setting forth a sex discrimination claim, what matters "is that in the mind of the perpetrator the discrimination is related to the sex of the victim," such as where a "perpetrator's actions stem from the fact that he believed that the victim was a man who 'failed to act like' one."[38]

Although some courts are moving in the direction of including transgender individuals within the purview of Title VII, many still deny transgender individuals protection. Since the circuits are split on this issue, a transgender individual bringing a claim of sexual harassment for gender discrimination in federal court will confront case law unfavorable to his/her position. However, claimants bringing their claims in California state courts will enjoy explicit protection against employment discrimination under the FEHA.

II. GROOMING CODE PROTECTION UNDER THE FEHA

Another critical difference between the FEHA and Title VII protection is language pertaining to dress codes. The 2003 Amendments added CAL. GOV'T CODE § 12949 to the FEHA, clarifying the employer's ability to set standards for workplace appearance:

> Nothing in this part relating to gender-based discrimination affects the ability of an employer to require an employee to adhere to reasonable workplace appearance, grooming, and dress standards not precluded by other provisions of state or federal law, provided that an employer shall allow an employee to appear or dress consistently with the employee's gender identity.[39]

This language may at first blush appear to diminish some of the protection that the 2003 Amendments provided to transgender individuals. However, under close examination, the statute may instead enhance protection under the FEHA by explicitly permitting employees to "appear or dress consistently with the employee's gender identity." This language grants an employee the freedom to reflect his/her gender identity at the workplace, even if it does not conform to his/her sex.

There is no similar dress code protection provided under Title VII. Courts have found no Title VII violation in gender-specific dress and grooming codes, so long as the codes do not disparately impact one sex or impose an unequal burden.[40] They have further permitted evenhanded and evenly applied grooming codes to be enforced even when based on highly stereotypical notions of how men and women should appear.[41] However, in light of *Price Waterhouse* and *Smith*, it is unclear how the plight of transgender individuals would fit into the unequal burden analysis.

Since transgender individuals do not identify with the gender roles associated with their anatomical sex, adherence to a strict dress code that reflects stereotypical notions of how men and women should appear can mean an extremely uncomfortable and unnatural demand for them. Still, because courts ignore the fact that sex and gender do not correspond for transsexuals in their

application of the unequal burden analysis, dress codes that require transsexuals to reflect the gender associated with their sex are not found to be in conflict with Title VII. As a result, in many jurisdictions where "sex" is construed narrowly to mean biological characteristics, transgender individuals must either repress their gender identity or risk losing their jobs.

In *Schroer v. Billington*, however, District Court Judge James Robertson addressed this problem head on. Citing the District Court Judge Grady's decision in *Ulane v. Eastern Airlines, Inc.,* (*Ulane I*),[42] he suggested that "'sex is not a cut-and-dried matter of chromosomes,' [r]ather, it encompasses 'sexual identity,' which 'is in part a psychological question --a question of self-perception; and in part a social matter – a question of how society perceives the individual.'"[43] Judge Robertson further encouraged revisiting the position advanced in *Ulane I* that "discrimination against transsexuals because they are transsexuals is 'literally' discrimination 'because of... sex.'"[44] However, views of Judges Robertson and Grady are not uniformly accepted.

In a related matter, California's Fair Employment and Housing Commission (FEHC) issued a precedential decision on transgender discrimination in public accommodation under the Unruh Civil Rights Act.[45] In *Dept. Fair Empl. & Hous. v. Marion's Place*,[46] a male-to-female transgender individual asserted her right to wear traditionally feminine clothing as a customer in a nightclub.[47] Finding no legitimate business reasons existed, the FEHC held the nightclub's dress code violated the Unruh Civil Rights Act,[48] because it "impermissibly and arbitrarily discriminates on the basis of sex . . . ."[49] However, citing to CAL. GOV'T CODE § 12949, the FEHC qualified that its decision was "a narrow one," because "the Legislature has recognized California employers' right to impose dress codes in the workplace, consistent with their employees' gender identity ...."[50]

While courts increasingly recognize the divide between "sex" and "gender" and the unfairness in permitting employers to require transgender individuals to satisfy a stereotypical male or female grooming standard, no firm conclusion has been made on these issues. In order for a

transgender individual to make out a Title VII case on the ground that an employer's grooming code is sex discrimination, s/he must show that the code places an unequal burden on one sex or the other.[51] However, to satisfy a claim under the FEHA, a transgender individual needs to show that the employer's grooming code does not allow him/her to dress consistently with his/her gender identity.[52] This difference provides transgender individuals working in California greater protection against discrimination, because a showing of unequal burden is not necessary to satisfy a discrimination claim.

II. CONCLUSION

Transgender individuals have historically endured unbridled and ugly discrimination in the workplace. Until the past decade, they have struggled to repress or hide their gender identities to survive in the work environment. With promising decisions like the ones rendered in *Price Waterhouse* and *Smith*, they are finally offered a possibility of federal protection under Title VII. However, while some courts have boldly extended protection to transgender individuals, though under a general cover against gender stereotyping, others have flatly denied transgender individuals Title VII protection.

Luckily for California workers, the FEHA provides specific protection to transgender individuals by including "gender" into its definition of "sex." The FEHA further grants transgender individuals the freedom to outwardly express their gender identities in the workplace. Clearly, protection under California law is broader and more specific to transgender individuals. Title VII, however, offers promising hope for employees outside California that they will one day enjoy similar protections offered under the FEHA.

* Tzu Chuan Teng, Santa Clara University School of Law, is the First Place Winner of the 2006 Competition for Outstanding Student Papers in the Area of Labor and Employment Law, a statewide competition sponsored by the Labor and Employment Law Section. This article is her winning entry.

[1] *Cf. Smith v. City of Salem, Ohio*, 378 F.3d 566, 572 (6th Cir. Aug 5, 2004); CAL. GOV'T. CODE § 12926(p), amended by Assemb. Bill 196, 2003-2004 Reg. Sess., ch. 164, 2003 Cal. Stat. 1. CAL. PEN. CODE § 422.56(c), added by Sen. Bill 1234, 2003-2004 Reg. Sess., ch. 700, 2004 Cal. Stat. 5.
[2] 42 U.S.C. § 2000e-2.
[3] Assemb. Bill 196, 2003-2004 Reg. Sess., ch. 164, 2003 Cal. Stat. 1-2.
[4] CAL. GOV'T. CODE § 12900 et seq.
[5] CAL. GOV'T. CODE §§ 12926(p), 12949; *see also* CAL. PEN. CODE § 422.56(c).
[6] CAL. GOV'T. CODE § 12926(p).
[7] *Id.*
[8] *Id.*
[9] CAL. PEN. CODE § 422.56(c).
[10] Assemb. Bill 196, 2003-2004 Reg. Sess., ch. 164, 2003 Cal. Stat. 1.
[11] CAL. GOV'T. CODE § 12926(p); CAL. PEN. CODE § 422.56(c).
[12] 42 U.S.C. § 2000e-2.
[13] *Id.*
[14] *Compare Ulane v. Eastern Airlines,* 742 F. 2d 1081, 1084 (7th Cir. 1984), *cert. denied*, 471 U.S. 1017 (1985) (TitleVII protection does not extend to transsexuals) with *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989) (differential treatment of men and women resulting from non-adherence to sex-stereotypes may be considered sex discrimination for purposes of Title VII protection), and *Smith*, 378 F.3d at 575 ("transsexual" label is not fatal to a sex discrimination claim where the victim has suffered discrimination because of his or her gender non-conformity).
[15] Since its enactment, California courts have not issued any published decisions on the application of the Gender Non-Discrimination Act of 2003. However, in 2006, the Fair Employment and Housing Commission issued a precedential decision on the related issue of transgender discrimination in public accommodation. *Dept. Fair Empl. & Hous. v. Marion's Place*, No. 06-01-P, FEHC Precedential Decs., 2006 CAFEHC LEXIS 1 (Cal. F.E.H.C. Feb. 1, 2006). The decision refers to CAL. GOV'T CODE § 12949, the dress code provision under the 2003 Amendments. *Id.* at *31, n. 11. See discussion *infra* under II. Grooming Code Protection under the FEHA.
[16] *Id.*
[17] *See Ulane*, 742 F.2d at 1085 (Title VII does not protect transsexuals, the court stated: "The words of Title VII do not outlaw discrimination against a person who has a sexual identity disorder, *i.e.*, a person born with a male body who believes himself to be female"). *See also Voyles v. Ralph K. Davies Medical Ctr.,* 403 F. Supp. 456, 476 (9th Cir. 1975) (employment discrimination based on one's transsexualism is not, nor was intended by the Congress to be, proscribed by Title VII of the Civil Rights Act of 1964); *Wood v. C.G. Studios*, 660 F. Supp. 176, 178 (E.D. Penn. 1987) (the term "sex" should be given its traditional meaning).
[18] *Ulane*, 742 F. 2d at 1082.
[19] *Simonton v. Runyon*, 232 F.3d 33, 35 (2d Cir. 2000) (Title VII does not prohibit harassment or discrimination because of sexual orientation); *Ulane*, 742 F.2d at 1084 ("Congress manifested an intention to exclude homosexuals from Title VII coverage").
[20] *Dobre v. National R.R. Passenger Corp.*, 850 F. Supp. 284, 287 (E.D. Penn. 1993) (Congress did not intend Title VII to protect transsexuals from discrimination on the basis of their transsexualism); *Wood*, 660 F. Supp. at 178; *Voyles*, 403 F. Supp. at 476.
[21] *Price Waterhouse v. Hopkins*, 490 U.S. 228.
[22] *Schwenk v. Hartford*, 204 F.3d 1187, 1201 (9th Cir. 2000) (holding that the "initial judicial approach taken in cases such as *Holloway* has been overruled by the logic and language of *Price Waterhouse*"). *See also Smith v. City of Salem*, 369 F.3d 912 (6th Cir. 2004) *later amended and superceded by Smith*, 378 F.3d 566 (6th Cir. Aug 5, 2004).
[23] *Price Waterhouse*, 490 U.S. at 232.
[24] *Id.* at 272.

[25] *Id.* at 251 ("As for the legal relevance of sex stereotyping, we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group, for '[i]n forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.' *Los Angeles Dept. of Water and Power v. Manhart*, 435 U.S. 702, 707, n. 13 (1978), quoting *Sprogis v. United Air Lines, Inc.*, 444 F. 2d 1194, 1198 ([7th Cir.] 1971)."
[26] *Id.*
[27] *Schwenk*, 204 F.3d at 1201 (the "initial judicial approach taken in cases such as *Holloway* has been overruled by the logic and language of *Price Waterhouse*").
[28] *Smith*, 378 F.3d at 575. ("Sex stereotyping based on a person's gender non-conforming behavior is impermissible discrimination, irrespective of the cause of that behavior; a label, such as 'transsexual,' is not fatal to a sex discrimination claim where the victim has suffered discrimination because of his or her gender non-conformity.")
[29] *Id.* at 568.
[30] *Id.*
[31] *Id.* at 569.
[32] *Id.* at 572.
[33] *Id.*
[34] *Id.* at 575.
[35] *Id.*
[36] *See Schroer v. Billington,* 424 F. Supp.2d 203, 213 (D.D.C. 2006); *Schwenk*, 204 F.3d 1187, 1202 (9th Cir. 2000) ("[d]iscrimination because one fails to act in the way expected of a man or woman is forbidden under Title VII.").
[37] *Schwenk,* 204 F.3d at 1202.
[38] *Id.*
[39] CAL.GOV'T.CODE § 12949, added by Assemb. Bill 196, 2003-2004 Reg. Sess., ch. 164, 2003 Cal. Stat. 2.
[40] *See, e. g.*, *Jespersen v. Harrah's Operating Co.*, 392 F.3d 1076 (9th Cir. 2004) (no violation of Title VII where employer's grooming code required each sex to conform to equally burdensome stereotypical standards); *Frank v. United Airlines, Inc.*, 216 F.3d 845 (9th Cir. 2000); *Harper v. Blockbuster Entertainment Corp.*, 139 F.3d 1385 (11th Cir. 1998); *Tavora v. New York Mercantile Exchange*, 101 F.3d 907 (2nd Cir. 1996). *See generally Carroll v. Talman Federal Sav. & Loan Asso.*, 604 F.2d 1028 (defendant's dress code, which required all of its female tellers, office and managerial employees to wear a uniform, whereas male employees in the same positions were only required to wear customary business attire, discriminated against plaintiff female employees in violation of Title VII).
[41] *Schroer*, 424 F. Supp. 2d at 209.
[42] *Ulane v. Eastern Airlines, Inc.*, 581 F. Supp. 821, 825 (N.D. Ill. 1983) (*Ulane I*) *rev. by Ulane*, 742 F.2d 1081.
[43] *Ulane*, 742 F.2d at 1084.
[44] *See Schroer*, 424 F. Supp. 2d at 212.
[45] CAL. CIV. CODE § 51.
[46] *Dept. Fair Empl. & Hous. v. Marion's Place*, 2006 CAFEHC LEXIS 1.
[47] *Id.* at *6-7.
[48] As incorporated in the FEHA by CAL. GOV'T CODE § 12948.
[49] *Dept. Fair Empl. & Hous. v. Marion's Place*, 2006 CAFEHC LEXIS 1 at *31.
[50] *Id.* at *31, n. 11.
[51] *Id.*; *see e.g.*, *Jesperson*, 392 F.3d at 1110.
[52] CAL.GOV'T.CODE § 12949.